

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE EXAMINATION OF PRIVILEGE
CLAIMS

Case No. MC15-0015-JCC-JPD
Case No. C12-2091-JCC

ORDER ADOPTING REPORT AND
RECOMMENDATION REGARDING
MOTION TO DISQUALIFY

This matter comes before the Court on the Relators' objections (Dkt. No. 143) to the Report and Recommendation (Dkt. No. 141) issued by the Honorable James P. Donohue, United States Magistrate Judge. Having reviewed Judge Donohue's Report and Recommendation, the Relators' objections, and the relevant record, the Court ADOPTS the Report and Recommendation (Dkt. No. 141) for the reasons set forth herein.

I. BACKGROUND

This ancillary proceeding arose from Case No. C12-2091-JCC, a *qui tam* action filed against Avanade by its former employee, Maria Uchytel, on behalf of the United States. (Dkt. No. 125 at 1.) Jean DeFond, Avanade's former in-house counsel, was also named as a relator in the *qui tam* action. (Dkt. No. 125 at 1.) DeFond sought the Court's guidance as to whether she could participate in the case and whether certain documents in her possession were protected by the attorney-client privilege. (Dkt. No. 125 at 1.) Judge Donohue set up this proceeding to

1 answer those questions. (*See* Dkt. No. 125 at 2.) The present order addresses the question of
2 DeFond's participation in this case.

3 The underlying *qui tam* action pertains to Avanafe's sale of software called "Task
4 Management Tool," or TMT, to federal agencies. (*See* Dkt. No. 150 at 308-09.) The Relators
5 allege that Avanafe defrauded the United States by overcharging and charging multiple times for
6 the TMT software. (Dkt. No. 150 at 309.) DeFond's duties at Avanafe included preparing
7 licenses and other sales documents for TMT sales to federal agencies. (Dkt. No. 150 at 303.)

8 Avanafe moved to disqualify DeFond as a relator, arguing that she breached her duties of
9 loyalty and confidentiality in violation of the Washington Rules of Professional Conduct (RPCs).
10 (Dkt. No. 88 at 3.) Specifically, Avanafe asserted that DeFond impermissibly switched sides
11 under RPC 1.9(a) and used information relating to the representation of a former client to the
12 client's disadvantage under RPC 1.9 (c). (Dkt. No. 88 at 9, 16.)

13 Judge Donohue recommended that Avanafe's motion be granted. (Dkt. No. 141.) He
14 made this recommendation under RPC 1.9(a), reasoning that DeFond, as a relator, represented
15 the United States in the *qui tam* action, which is substantially related to her prior representation
16 of Avanafe. (Dkt. No. 141 at 11, 15.) Because Judge Donohue determined that DeFond should
17 be disqualified under RPC 1.9(a), he found it unnecessary to determine whether she would also
18 be disqualified under RPC 1.9(c). (Dkt. No. 141 at 17.)

19 The Relators objected to Judge Donohue's report and recommendation. (Dkt. No. 143.)
20 They made three objections: first, that the report created a *per se* bar precluding attorneys from
21 serving as relators; second, that attorneys serving as relators do not represent the United States
22 within the meaning of RPC 1.9(a); and third, that Judge Donohue failed to resolve the primary
23 issue of whether DeFond can disclose the documents in her possession to the United States. (Dkt.
24 No. 143 at 1-2.)

1 **II. DISCUSSION**

2 **A. Standard of Review**

3 A district judge reviews objections to a magistrate judge's report and recommendation *de*
4 *novo*. Fed. R. Civ. P. 72(b)(3). The district judge may accept, reject, or modify the recommended
5 disposition; receive further evidence; or return the matter to the magistrate judge with
6 instructions. *Id.*

7 **B. Analysis**

8 Under RPC 1.9(a), a "lawyer who has formerly represented a client in a matter shall not
9 thereafter represent another person in the same or a substantially related matter in which that
10 person's interests are materially adverse to the interests of the former client unless the former
11 client gives informed consent, confirmed in writing."

12 The Relators first argue that Judge Donohue's report creates a *per se* bar precluding
13 attorneys from serving as relators. (Dkt. No. 143 at 1.) But, Judge Donohue's report explicitly
14 acknowledges that DeFond's status as an attorney did not automatically disqualify her from
15 serving as a relator. (Dkt. No. 141 at 8-10.) His recommendation that DeFond be disqualified
16 stemmed instead from his application of RPC 1.9(a) to the facts of this case. (*See* Dkt. No. 141 at
17 14.) The Court acknowledges the Relators' concerns about the practical impacts of disqualifying
18 attorneys who have been exposed to certain information. (*See* Dkt. No. 143 at 2-5.) Nonetheless,
19 this is not the proper forum for raising such policy concerns. The Court is bound to apply RPC
20 1.9(a) as it is written.

21 The Relators next argue that Judge Donohue misapplied the law as to whether DeFond
22 "represents" the United States within the meaning of RPC 1.9(a) when serving as a relator. (Dkt.
23 No. 143 at 1.) The Relators maintain that Rule 1.9(a) is triggered only when an attorney
24 represents both clients in an attorney-client capacity. (Dkt. No. 143 at 5.) They rely on *United*
25 *States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 166 (2nd Cir. 2013), where the Second Circuit
26 stated that a relator "act[ed] neither as the real party in interest nor in a representative capacity."

1 However, this was not in the context of an RPC 1.9(a) analysis; in fact, the court explicitly stated
2 that it was not considering the “side-switching” rule. *Id.* at 165. Moreover, the district court order
3 that the *Quest* court affirmed—albeit on different grounds—explicitly held that a *qui tam*
4 plaintiff “represents” the United States within the meaning of the side-switching rule. *United*
5 *States ex rel. Fair Laboratory Practices Assocs. v. Quest Diagnostics, Inc.*, 2011 WL 1330542 at
6 *7 (S.D.N.Y. 2011). This is consistent with Ninth Circuit authority, which states that “*qui tam*
7 relators are not prosecuting only their ‘own case’ but also representing the United States.” *Stoner*
8 *v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-27 (9th Cir. 2007).

9 Finally, the Relators argue that Judge Donohue failed to address the primary issues of
10 privilege presented under the initial referral order. (Dkt. No. 143 at 10.) However, Judge
11 Donohue has partially addressed the privilege issues (Dkt. No. 125), and the Court adopted his
12 privilege order in full (Dkt. No. 152). His decision to delay consideration of the remaining
13 issue—the crime-fraud exception—was well within his authority. *See In re HQ Sustainable*
14 *Maritime Indus., Inc.*, 826 F. Supp. 2d 1256, 1263 (W.D. Wash. 2011) (“The Court has inherent
15 powers to control its docket and to promote the efficient use of resources for itself and the
16 parties.”).

17 **III. CONCLUSION**

18 For the foregoing reasons, the Court ADOPTS the Report and Recommendation (Dkt.
19 No. 141). This matter is REFERRED to Judge Donohue to conduct further necessary
20 proceedings, including determining whether the crime-fraud exception applies.

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1 DATED this 1 day of December 2015.

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8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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